No. 241

SEP 6 19

CHARLES ELMORE

In the Supreme Court of the United States

OCTOBER TERM, 1950

KOFFLER-BRESLAUER-VANE COMPANY, a corporation,

Petitioner,

vs.

DARLING LUMBER COMPANY, INC., a corporation, and MARK C. STORER, individually,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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Petitioner,

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DANEBO LUMBER COMPANY, INC., a corporation, and MARK C. STORMS, individually,
Respondents.

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BRIEF OF RESPONDENTS IN OPPOSITION

OPINIONS BELOW

Findings of Fact and Conclusions of Law of the U. S. District Court may be found on page 39 of the transcript of record.

The opinion of the United States Court of Appeals for the Ninth Circuit will be found on pages 159 to 176 inclusive of the Transcript of record.

JURISDICTION

The jurisdiction of this court is invoked under Section 1254 United States Code.

QUESTIONS PRESENTED

The issue presented in the lower courts was whether or not the petitioner was and is entitled to maintain an action in equity to recover moneys which it paid to respondents in pursuance of an unlawful and illegal purpose and in violation of the Emergency Price Control Act of 1942 as amended (Title 50 App. U. S. C. A. Sections 901-946). The Court of Appeals held that the petitioner was not entitled to maintain such action because petitioner was in pari delicto and was not in court with clean hands.

STATUTES INVOLVED

Section 4 of the Emergency Price Control Act of 1942 as amended (Sec. 904 (a), Title 50 App. U S. C. A.) reads as follows:

> "(a) It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity or to demand or receive any rent for any defense-area housing accom-

modations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2 (section 902 of this Appendix), or of any price schedule effective in accordance with provisions of section 206 (section 926 of this Appendix), or of any regulation, order, or requirement under section 202 (b) or section 205 (f) (sections 922 (b) or 925 (f) of this Appendix), or to offer, solicit, attempt, or agree to do any of the foregoing."

Title 18, Sec. 88, U. S. Code Annotated reads as follows:

(Criminal Code, section 37). Conspiring to commit offense against United States. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both. (R. S. Sec. 5440; May 17, 1879, c. 8, 21 Stat. 4; Mar. 4, 1909, c. 321 sec. 37, 35 Stat. 1096.)"

STATEMENT

The petitioner in its complaint filed in the United States District Court for Oregon alleged that it paid the sum of $15,000.00 to the respondents for the purchase of lumber over the maximum ceiling price as established under the Emergency Price

Control Act of 1942 as amended and with the deliberate intent and purpose of violating said Emergency Price Control Act. (Par. 9, p. 5, transcript of record.)

The Manager for the petitioner, Mr. Vana, who handled the transaction for the petitioner testified that the $15,000.00 was paid to the respondents as a payment of $10.00 per thousand feet over and above the ceiling price for 1,500,000 feet of lumber. (Trans. of record p. 63.)

The Court of Appeals also found:

> "Vana thus paid in advance the entire over ceiling part of the sales price of a million and a half feet of lumber which Danebo was to sell to Kincaide at the ceiling price. That contract with Danebo was fully executed by Vana." (Trans. of record p. 162 and 163.)

No fraud, duress or coercion is alleged in the complaint and no fraud or coercion was at any time claimed or asserted by the petitioner.

The District Court in its Findings of Fact and Conclusions of Law stated:

> "* * * I find that plaintiff and defendants and others were engaged in a conspiracy to violate the Emergency Price Control Act of 1942 as amended and the regulations thereunder. * * *" (Trans. of record p. 39.)

There was no finding of fraud, duress, or economic coercion.

In the opinion written by Judge Denman the United States Court of Appeals for the Ninth Circuit found that Vana

> "By the payment of a consideration of $15,000 and by Danebo by the making of its contract to sell to Kincaide, then being a felonious black market conspiracy both to violate a federal criminal law and to defraud the United States, is a transaction malum in se in which Vana is in pari delicto with Danebo." (Trans. of record p. 164.)

ARGUMENT

The respondents at the outset contend that under the established rules of this court (Rule 38, Sec. 5 (b)) this court will not entertain the petition for a writ of certiorari.

This case had not previously been before a United States Court of Appeals. Hence there is no conflict of decisions in different courts of appeal; nor is there any question of local law involved; nor is there any question of a Federal law or statute involved; nor has there been any decision made on a Federal question in conflict with the applicable decisions of this court. Consequently we see no reason or justification for granting the petition.

The United States District Court for the District of Oregon in its findings of fact found that petitioner and the respondents were engaged in a conspiracy to violate a Federal law. (Trans. of record p. 39.)

The petitioner does not challenge this finding. The conclusion, therefore, is that the petitioner violated Section 37 of the U. S. Criminal Code (18 U. S. C. A. Sec. 88), the provisions of which are as follows:

> Criminal Code, Section 37. **Conspiring to commit offense against United States.** If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both. (R. S. Sec. 5440; May 17, 1879, c. 8, 21 Stat. 4; Mar. 4, 1909, c. 321, Sec. 37, 35 Stat. 1096.)

A violation of this act is a felony under the definitions of the U. S. Criminal Code. (Criminal Code Sec. 335—18 U. S. C. A. Sec. 541.) It will not and cannot be disputed that the commission of a felony is malum in se and involves moral turpitude.

The United States Court of Appeals likewise found that the petitioner was a co-conspirator in this felonious conspiracy. (Trans. of record p. 164.)

The court of appeals also held that there was a further conspiracy to commit the crime of violating Sec. 4 (a) of the Emergency Price Control Act prohibiting agreements or solicitations to sell at prices in excess of O. P. A. maximum. (Trans. of record p. 165.)

It must be kept in mind that this agreement, which the petitioner alleged in his complaint and its manager admits in his testimony was for the purpose of evading and violating said Emergency Price Control Act, was willingly and deliberately entered into.

Furthermore, Mr. Vana, Manager for the petitioner, admitted that the sham option so-called was for the purpose of concealing the illegal act and if necessary falsifying his position in order to escape the penalty of such unlawful act. (Trans. of record p. 58 and 59.)

In order to escape application of the rule of pari delicto the petitioner in its petition for the first time raises the question of economic coercion. It was not raised in the pleadings or proceedings in the U. S. District Court, nor was it raised in the United States Court of Appeals. In any event over a period

of three years there was a total of 1,500,000 feet of lumber involved, and only one manufacturer. We cannot understand how any one can seriously contend that under these circumstances the respondents were in a position to exercise any economic coercion, even were that question involved.

However, the facts, as counsel for petitioner now contend, would not amount to "economic coercion" as defined by this court in the case of

Radich v. Hutchins, 95 U. S. 213

where the court said:

> "To constitute the coercion or duress which will be regarded as sufficient to make a payment involuntary, * * * there must be some actual or threatened exercise of power possessed, or believed to be possessed, by the party exacting or receiving the payment over the person or property of another, from which the latter has no other means of immediate relief than by making the payment. As stated by the Court of Appeals of Maryland, the doctrine established by the authorities is, that 'a payment is not to be regarded as compulsory, unless made to emancipate the person or property from an actual and existing duress imposed upon it by the party to whom the money is paid'."

The key case cited by counsel, namely:

Spring v. Knowlton, 103 U. S. 49

was clearly distinguished in the opinion of the United States Court of Appeals in the following language:

> "In Spring v. Knowlton, 103 U. S. 49 the transaction instead of being felonious as to both parties was expressly held not malum in se. Neither party realized that its action violated any law and the scheme was abandoned when its illegal character was realized." (Trans. of record p. 174.)

This distinction in our opinion is unanswerable.

The decisions of this court subsequent to the *Spring v. Knowlton* case uphold the decision of the Court of Appeals.

In the case of

Harriman v. Northern Securities Company, 197 U. S. 244,

we find this language:

> "The final contention in that regard is that they are entitled to a decree rescinding the contract of purchase and sale and directing the

return of the railway shares parted with them thereunder because of the illegality of the transaction as adjudged in the Federal Courts." *"And this in defiance of the settled rule that property delivered under an illegal contract cannot be recovered back by any party in pari delicto."* (Italics ours.)

Again in the case of

St. Louis V. & T. H. R . R. Co. v. Terre Haute, I. R. Co., 145 U. S. 393,

we find this language:

"If the contract is illegal affirmative relief against it will not be granted at law or in equity unless the contract remains executory or unless the parties are considered not in equal fault, as when the law violated is intended for the coercion of the one party and the protection of the other, or where there has been fraud or oppression, on the part of the defendant."

In the case of

Precision Instrument Mfg. Co. et al v. Automotive Maintenance Machinery Company, 325 U. S. 997,

Justice Murphy speaking for this court said:

"The guiding doctrine in this case is the equitable maxim that 'he who comes into equity must come with clean hands.' This maxim is far more than a mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behaviour of the defendant."

The following decisions fully support the decision of the United States Court of Appeals in this case:

Keystone Driller Co. v. General Excavator Co., 290 U. S. 240,

Ford v. Caspers, 128 Fed. Rep. (2d) 885 (C. C. A.),

Carolene Products Co. v. Evaporated Milk Assoc., 93 Fed. Rep. (2d) 202 (C. C. A.),

Mas v. Coca Cola Co., 163 Fed. Rep. (2d) 505 (C. C. A.),

Farrington v. Stucky, 165 Fed. Rep. 325 (C. C. A.),

Marshall v. Lovell, 19 Fed. Rep. (2d) 75 (C. C. A.)

Ring v. Spina, 335 U. S. 813

which counsel cite as supporting the petitioner's position on the question of economic duress was an

action for treble damage under the Sherman Act where the court expressly recognized that it was "not a suit in equity where the clean hands doctrine is applicable but merely a suit on a special statute which takes no account of the conduct of the plaintiff prior to the time the cause of action arose." On the general principles involved this case fully supports the opinion of the court of appeals in the case.

We now wish to call the court's attention to some statements counsel have made which find no support in the record.

On *page 17* of counsel's brief, they state;

> "It is our contention that the reference in the opinion to the Government being defrauded was not involved in this controversy because the Government was not defrauded in any way."

The Circuit Court of Appeals did not hold or state that the United States had been defrauded. What it did say was this:

> "Here is a felonious conspiracy to defraud the United States. * * *" (Trans. of printed record p. 164.)

On *page 18* of counsel's brief they state:

> "The lower court found that they (meaning all of the retailers) were under economic coer-

cion and were compelled on account of their investment to buy lumber over OPA prices."

The facts are there never was any such a finding by the United States District Court or the Court of Appeals.

In reason No. 2 on page 14 of counsels' brief they state "The court refused to recognize that there is such a thing as economic coercion. * * *" The facts are that "economic coercion" is not mentioned or referred to in the opinion.

On page 24 of counsel's brief they state this rule (meaning rule concerning economic coercion) was recognized by Judge Bowen in his opinion in the lower court. Of course, this case was not tried before Judge Bowen but was tried before Judge McColloch in Portland, Oregon, and Judge McColloch in no way mentioned economic coercion, neither did counsel for the petitioner.

In specification of error No. 5, p. 12, counsel states:

Vana advanced $15,000.00 on July 17, 1946, after the old act had expired and before the new act took effect.

The evidence is that Vana gave Kincaide the check in that amount on that date. (Trans. of record p. 85.)

The agreement, however, which counsel insists was a sham and which they sought to have cancelled was entered into on August 29, 1946, at which time the money was paid to the respondents. (Trans. of record p. 148-149.)

Until that time Kincaide retained the check. (Trans. of record p. 1115.) The cancelled check (exhibit 3, record p. 152) shows that the check was cashed at Eugene, Oregon, on September 9, 1946.

On page 20 of counsel's brief they assume to quote from the case of

McCullen v. Hauptman,

the correct title of the case to which counsel refer is *McMullen v. Hoffman,* 174 U. S. p. 639. The quotation is inaccurate, in that an important part was omitted without indicating the omission. The correct quotation is as follows:

> "It has been sometimes said that where a contract, although it be illegal, has been fully executed between the parties so that nothing remains thereof for completion, *if the plaintiff can recover from the defendant* moneys received by him without resorting to the contract the court will permit a recovery in such case. * * *"

Counsel omitted the portion in italics.

This case in its entirety supports the opinion of the U. S. Court of Appeals in this case.

On page 21 of counsel's brief they assume to quote from the case of

Thomas v. City of Richmond, 12 Wall. 349.

This quotation is so incorrect and perverted as to convey an entirely different meaning than was intended. Omissions are made without any indication of an omission and words are added that do not appear in the opinion.

The same is true of the quotation from

Kempe v. the United States, 151 Fed. (2d) 680,

appearing on page 22 of counsel's brief.

There are over a dozen omissions appearing in this quotation. When correctly quoted the citation fails to support the contention of the petitioner.

The purported quotation from

Blumenthal v. United States

appearing on page 23 of counsel's brief is offered to establish that the actions of the petitioner were not malum in se.

This is likewise an incorrect quotation and there are so many errors and omissions it would unduly prolong this brief if we attempted to point them out in detail. Suffice to say that selecting words or sentences here and there from an opinion and putting them together without indicating skips or omissions and thus conveying a different view than that intended is in our judgment the wrong way to present a question to this court or to any court.

There are other inaccuracies in counsel's brief which indicate that they have not carefully studied the opinion of the Court of Appeals or have misconstrued its meaning.

As we understand it this court will not review disputed questions of fact on a petition for writ of certiorari. However, in view of the context of petitioner's brief we felt compelled to devote more space to the facts than would otherwise have been necessary.

We repeat that none of the reasons urged for granting the petition meet the specifications of Rule 38, Section 5, subdivision (b) and it is apparent that there are no questions here involved which affect the interests of the nation in its internal or external relations, nor is there any question involved affecting the general economy or the welfare of the nation.

Forsyth v. Hammond, 166 U. S. 506,
Hamilton Brown Shoe Co. v. Wolf, 240 U. S. 251

CONCLUSION

We submit, therefore, that the decision of the United States Court of Appeals for the Ninth Circuit is correct and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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